No. 15054

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

BENJAMIN HARRISON AND JONES STEVEDORING COMPANY, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from that part of a decree in admiralty entered on September 13, 1955, by the United States District Court for the Northern District of California, Southern Division, which dismissed the third party claim of the appellant-respondent against the appellee-respondent-impleaded (R. 36–37). The basic libel, filed by one Benjamin Harrison, a longshoreman, against the appellant-respondent as owner of the vessel S. S. *Private John R. Towle,* alleged that the libellant had been injured as the result of the unseaworthiness of the said vessel and of the appellant's negligence (R. 3–7). The district court's jurisdiction to maintain this libel was invoked under the

Suits in Admiralty and Public Vessels Acts (R. 4). The appellant impleaded the appellee, the libellant's employer, pursuant to Admiralty Rule 56, on the ground that appellee had undertaken to hold appellant harmless from such liability (R. 15–21). The district court's jurisdiction to maintain this third party complaint was based upon 28 U. S. C. 1333 (1), 1345. The district court, resting its jurisdiction on the Public Vessels Act (R. 33), decided in favor of the libellant and of the respondent-impleaded (R. 36–37). A notice of appeal limited to the dismissal of the impleader was filed by the United States on December 8, 1955 (R. 38). The time for docketing the appeal was extended by order of the district court to and including March 7, 1956. The case was docketed in this Court on March 5, 1956 (R. 115). The jurisdiction of this Court rests on 28 U. S. C. 1291.

STATEMENT

1. The contract

In 1954 the appellee, Jones Stevedoring Company, had contracted to perform stevedoring services, *i. e.*, the loading and unloading of vessels for the United States Army in the San Francisco Bay area (R. 98). Clause 12 of the contract (R. 102–105) provided among others that the appellee:

> * * * shall be responsible for and shall hold the Government harmless from any and all loss, damage, liability and expense for * * * bodily injury to or death of persons occasioned either in whole or in part by the negligence or fault of the Contractor, his officers, agents or employees

in the performance of work under this contract. * * * (R. 102).

Liability was excepted in two circumstances which briefly may be described as follows:[1] (1) where the accident was caused in part by the unseaworthiness of the vessel or a defect of its equipment and if the stevedoring company by the exercise of due diligence either could not have discovered the unseaworthiness or defect, or could not have prevented the accident, and (2) where the accident was caused exclusively by the Government, or resulted from proper compliance of the stevedoring company with specific directions of the Contracting Officer.

2. The pleadings

In December 1954, one Benjamin Harrison, a longshoreman employed by respondent filed a libel in admiralty against the United States. The libel alleged that the United States was the owner of the

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[1] b. The Contractor shall not be responsible to the Government for and does not agree to hold the Government harmless from loss or damage to property or bodily injury to or death of persons:

(1) If the unseaworthiness of the vessel or failure or defect of the gear or equipment furnished by the Government contributed jointly with the fault or negligence of the Contractor in causing such damage, injury or death, and the Contractor, its officers, agents and employees, by the exercise of due diligence, could not have discovered such unseaworthiness or defect of gear or equipment, or through the exercise of due diligence could not otherwise have avoided such damage, injury or death.

(2) If the damage, injury or death resulted solely from an act or omission of the Government or its employees or resulted solely from proper compliance by officers, agents or employees of the Contractor with specific directions of the Contracting Officer (R. 103).

S. S. *Private John R. Towle,* and that libellant, while unloading said vessel on October 14, 1954, slipped on an accumulation of oil thereby injuring his leg. The libel alleged two causes of action, the first one was based on negligence (R. 3–6), the second one on the alleged unseaworthiness of the vessel (R. 6–7). Appellant impleaded appellee, the libellant's employer, on the grounds that pursuant to the terms of the stevedoring agreement appellee had agreed to hold appellant harmless from the claims asserted by appellant and that libellant's injuries had been caused by appellee's fault (R. 15–21).

3. The evidence

The evidence given at the trial with respect to the libellant's accident may be summarized as follows:

The libellant, Benjamin Harrison, has been a longshoreman since 1944; he performed virtually all his work in the San Francisco Bay area (R. 44). On October 14, 1954, he was dispatched by the longshoremen's hiring hall to the S. S. *Private John R. Towle* (R. 43).[2] Harrison and his fellow longshoremen boarded the vessel at about 8 a. m. (R. 45). The foreman of Harrison's gang was one Christian Jensen (R. 45, 82–84) who for the preceding thirty years had been working in the San Francisco Bay area either as a longshoreman or as a longshoreman's foreman (R. 83).[3] Jensen received his orders from the "walking boss" (R. 79), an employee of the stevedor-

[2] Ownership, management and control of the vessel by the appellant were conceded in the Answer (R. 8).

[3] Jensen worked in this field intermittently from 1922 to 1934 and continuously since 1934 (R. 83).

ing company (R. 91). He would report to this walking boss if he had to make any requests or complaints or whenever he needed instructions (R. 86).

Jensen and his gang, including Harrison, were assigned to unload Hatch No. 1 of the vessel (R. 46). Since the hatches were open, the longshoremen immediately entered the inbetween or shelterdeck in which jeeps were stowed (R. 46–47, 74–75). In the hold Harrison noticed that most of the deck was covered with oil, which appeared to him to have been lubricating oil leaked out of the jeeps' transmissions or crankcases (R. 47–48, 63, 75–76).[4] He advised the gang foreman, Jensen, of the dangerous condition of the floor and asked him to obtain sawdust (R. 48, 64, 76). Jensen thereupon left in order to obtain sawdust from the walking boss (R. 48, 64); in the meantime Harrison and the other members of his gang were cutting wires off the jeeps but did not unload them (R. 64).

According to Harrison's testimony, Jensen returned about five minutes later and stated that the walking boss had advised him that no sawdust was available (R. 48, 64). Harrison thereupon asked the foreman to obtain some sand instead (R. 49, 64). Jensen returned with the information that sand was not available either (R. 49, 64, 77), and left it up to the longshoremen whether they should work in these circumstances (R. 49). The walking boss, however, urged the men to unload the cargo anyhow, taking it easy and being as careful as possible (R. 49, 64–65, 77, 81). The men thereupon discussed the matter

[4] The jeeps were old and damaged vehicles (R. 95).

among themselves and decided to go ahead with the unloading of the jeeps (R. 49, 77). This decision was influenced by the circumstance that they were handling military cargo, and that the vessel was in command of military officers (R. 82).

Jensen's testimony with respect to his attempts to obtain sawdust and sand for his crew varies slightly from that given by Harrison. Jensen stated that he found the walking boss on the main deck, and asked him for sawdust or any other substance that would cut the grease, otherwise the men would have to stop working (R. 87). The walking boss replied that such substances were not available (R. 87). During this conversation a uniformed officer was within hearing distance. Jensen did not talk to him (R. 87) but heard the walking boss' request for sand or sawdust and the officer's answer that none was available (R. 92). Although he was not introduced to this officer and had no specific reason for this assumption (R. 86–87, 91), Jensen believed that he was the receiving officer, because, later on, he sought to supervise the discharge of jeeps and to prevent any damage to them in this process (R. 91, 95–96). As a matter of fact when this "receiving officer" interfered with the unloading Jensen threatened to stop the work (R. 95–96).[5]

[5] Jensen stated specifically that during the unloading the receiving officer "was interrupting me and the gang quite a bit":

"Q. What did this officer do?

"A. Just a moment. If they stick together like this, we have to hook on with wires and heave them out, and naturally you are all facing together, and of course those old cars, they was all damaged as they was, and you stand there and holler, 'Don't

When Jensen told the men of his gang that no substance to cut the oil was available he warned them that it was not safe to work and that they either should be careful or go home (R. 87). The men decided that they would stop the work (R. 88). Shortly thereafter the walking boss advised the longshoremen that the unloading of the vessel was urgent because it had to be reloaded in another port. He requested the men to work carefully and thus to make it possible for the vessel to leave port the same day (R. 88). At that time the walking boss was accompanied by a person in civilian clothes (R. 92), who seemed to Jensen to be the commanding officer (R. 88, 92).

Harrison and the other members of his gang thereupon proceeded to work on the jeeps and unloaded the shelter deck without incident (R. 49). This took about an hour (R. 80).[6] Then they began to open the hatch to go down to the next lower deck (R. 50). They removed the hatch boards and started to take out the strongbacks, *i. e.,* the strong beams which support the hatch boards and which give the ship lateral support while it is at sea (R. 50).

Harrison was assisting in the removal of the fourth and last strongback, and was turning the beam over. At that very moment he slipped and the heavy strong-

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damage them any more than they are. Don't damage them, don't damage them.'

"Q. That was this officer?

"A. Yes. And I said, 'Either we leave them alone or you keep your mouth shut,' I said, 'I am running this job and if we are not capable to do it,' I said, 'you may as well discharge us, get somebody else to do it.' " (R. 95–96.)

[6] Harrison entered the vessel at 8 a. m. (R. 45). The accident occurred at 9:15 a. m., Finding IX (R. 31).

back[7] fell across his leg (R. 53–54, 67–68). Harrison testified he believes that he slipped because his shoes had become oily (R. 53, 68, 81). He suffered a painful injury to his leg, and was unable to work for some five to six weeks (R. 52–62).

After the accident, the men stopped working (R. 56). Shortly thereafter the Port Transportation Officer (R. 106), who acted as a liaison between the vessel and the dock (R. 108), learned of the accident and, for the first time, of the oily condition of the deck (R. 107). He also received a request from the vessel for some substance to cover the oil (R. 107). He secured sand from a shed located 300 yards from the vessel (R. 107), and had it delivered there 15–20 minutes after Harrison had suffered his injury (R. 90). The longshoremen thereupon covered up the oil and resumed their work (R. 90–91, 108).

4. The decision below

The district court awarded judgment to libellant against appellant in the amount of $2,000.00, and dismissed the third party complaint (R. 36–37). It found that libellant's injury was caused solely, directly and proximately by the unseaworthiness of the vessel and the negligence of the appellant in permitting oil to accumulate on the shelter deck (Finding XI, R. 31), and not "solely, and /or directly and/or proximately caused by the carelessness and/or negligence" of the stevedoring company (Finding XVI, R. 32–33). It also found that appellee had not failed to use

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[7] Harrison estimated the weight of the strongback roughly at 1,500 lbs. (R. 66).

reasonable care for the prevention of accidents, and that libellant's injuries were not "caused or contributed to in whole or in part by the improper and/or careless and/or negligent manner in which respondent-impleaded [appellee], its officers, agents or employees, conducted themselves or their activities on board said vessel" (Finding XVI, R. 33). The pertinent Conclusions of Law (III, V, VI, R. 34), stated that the libellant's injuries were caused solely and proximately by the negligence of appellant and the unseaworthiness of the vessel, that there was no negligence or fault on the part of appellee which proximately or to any degree caused or contributed to libellant's injuries, and that appellee could not have avoided the injury to the libellant by the exercise of due diligence.

Appellant does not appeal from the award of damages to the injured longshoreman. It limits its appeal to the dismissal of its third party claim against the impleaded stevedoring company (R. 38).

SPECIFICATION OF ERRORS

1. The district court erred in failing to find and hold that under the terms of the stevedoring contract, appellee was liable to hold appellant harmless from the liability to the libellant Harrison.

2. The district court erred in finding and holding that the libellant's injuries were caused solely and exclusively by the carelessness and negligence of the appellant, its employees and agents, and by the unseaworthiness of the S. S. *Private John R. Towle.*

3. The district court erred in finding and holding that libellant's injuries were not caused in part by

the carelessness and negligence of appellee, its officers, agents or employees and that appellee could not have prevented the injury by the exercise of due diligence.

4. The district court erred in finding and holding that appellee did not fail to use reasonable care for the prevention of accidents.

5. The district court erred in holding that the appellee is not liable over to appellant for the whole of the damage award to the libellant.

6. The district court erred in dismissing appellant's petition under Rule 56 to bring in appellee as a third party.

SUMMARY OF ARGUMENT

In this case a longshoreman was injured while working under conditions known to be unsafe to his employer, the appellee stevedoring company, as well as to the appellant ship. The court below held that the ship, although liable to the longshoreman, was not entitled to be reimbursed by the stevedoring company. This ruling is direct conflict with the decisions of this Court in *United States* v. *Arrow Stevedoring Co.,* 175 F. 2d 329, certiorari denied, 338 U. S. 904 and *United States* v. *Rothschild International Stevedoring Co.,* 183 F. 2d 181. These decisions hold that a stevedoring company owes the duty to stop the work while a known danger exists. If it permits its employees to work and the ship is held responsible for injuries suffered in such circumstances, the ship is entitled to be reimbursed by the stevedoring company. These decisions of this Court are fully supported by an analysis of the nature of the right to indemnity and

the legal relationship between ship and stevedoring company.

I

Appellant's right to indemnity is based primarily upon the indemnity clause. Full understanding of that clause, however, requires a short discussion of the nature of indemnity.

Where, as a result of a breach of contract, the promisee has been subject to liability to a third person, reimbursement—or indemnity as it is frequently called—constitutes an element of the damages to which the promisee is entitled from the promisor. *Mowbray* v. *Merryweather,* [1895] 2 Q. B. 640. This liability for reimbursement exists in the absence of an express indemnity agreement and is predicated upon the breach of the implied undertaking to perform the contract in a careful and prudent manner. *Ryan Co.* v. *Pan-Atlantic Corp.,* 350 U. S. 124.

Basically, the indemnitee's right to reimbursement is not defeated by his concurrent fault. The indemnitor is usually a specialized contractor selected by the indemnitee for his professed expertise, and the indemnitee has the right to rely on his contractor's warranty that he will exercise the skill of his trade. *Boston Woven Hose, etc., Co.* v. *Kendall,* 178 Mass. 232, 59 N. E. 657; *Ryan Co.* v. *Pan-Atlantic Co.,* 350 U. S. 125. However, some courts have denied relief to an indemnitee on the ground that he and his contractor were *in pari delicti* or that he was guilty of primary or active negligence. Express indemnity clauses, such as the one here involved, are designed to eliminate this un-

certainty and to fix the ultimate allocation of the financial responsibility.

The express clause of the stevedoring contract provides that the stevedoring company undertakes to indemnify the ship where the injuries were caused either in whole or in part by the company's fault. The only exceptions are that the accident was caused by the unseaworthiness of the vessel, and the stevedoring company either could not have discovered the unseaworthiness, or could not have prevented the accident; that the accident was caused solely by the ship; or that it resulted from proper compliance by the stevedoring company with specific directions of the contracting officer.

This case comes squarely within the terms of the indemnity clause and none of the exceptions are applicable. The accident plainly was caused in part by appellee's negligence. Its representatives on board the vessel knew of the dangerous condition of the deck and should have stopped the work. According to the very terms and purposes of the express indemnity clause, appellant's concurrent fault, if any, does not defeat appellee's liability to reimburse the ship, nor is the ship's right to indemnity defeated by its request to continue the work or its failure to furnish sand.

The request to continue the work does not bring the case within the exception that the accident resulted solely from proper compliance with specific directions of the contracting officer. There was no indication that the request emanated from the "contracting officer." Moreover, a request to a stevedoring company

usually is only in the nature of a suggestion; the expert contractor has been hired for the very purpose of exercising his judgment and only "the clearest requirement" can relieve the contractor from exercising ordinary prudence. *McGeeney* v. *Moran Towing Corp.,* 149 F. 2d 791, 793 (C. A. 2); *The Robert R.,* 255 Fed. 37, 40 (C. A. 2). In view of appellee's plain duty to stop operations, compliance with the ship's request would not have been "proper."

Similarly, the ship's failure to supply sand did not relieve the stevedoring company of its responsibility in the premises. To the contrary, it had the duty to be "energetic" in trying to obtain it from other sources. *Metcalfe* v. *Chiarello,* 294 Fed. 29, 30 (C. A. 2). This did not cast an undue burden upon the company which was fully familiar with the San Francisco Bay area.

The accident thus was caused in part by appellee. It knew of the unsafe condition of the deck and could have prevented the accident either by stopping the work or by being insistent in obtaining the sand.[8]

The express indemnity clause thus was applicable.

II

The findings adverse to appellant (pp. 8–9) are not conclusive on this Court. As Findings of Fact they would be clearly erroneous, the error being based upon a mistaken evaluation of the duties assumed by a stevedoring company. Actually, however, in the absence of any dispute as to material facts, the findings are merely ruling on proper standards of care.

[8] An hour elapsed between the start of the work and the time which Harrison suffered his injuries.

Thus they are in effect Conclusions of Law and fully reviewable in this Court. *Barbarino* v. *Stanhope SS Co.,* 151 F. 2d 553 (C. A. 2); *Bonnewell* v. *United States,* 170 F. 2d 411 (C. A. 4).

ARGUMENT

The facts presented by this appeal are simple and undisputed. A longshoreman employed by the appellee stevedoring company was injured, while unloading appellant's vessel, as the result of the slippery condition of the vessel's deck. Appellant and appellee were both aware of the danger. Appellant apparently pointed to the need for speed and asked whether the unloading could proceed if precautionary measures were taken (p. 7); appellee permitted the work to continue in spite of the peril to which it exposed its employees.

The question presented by this appeal is whether having been held liable to the injured longshoreman, the appellant vessel is entitled to be reimbursed by the appellee stevedoring company.

We submit that this question must be answered unequivocally in the affirmative in view of the directly controlling decisions of this Court in *United States* v. *Arrow Stevedoring Co.,* 175 F. 2d 329, certiorari denied, 338 U. S. 904,[9] and *United States* v. *Rothschild International Stevedoring Co.,* 183 F. 2d 181.[10] In those cases, just as here, longshoremen had been injured as the result of defective conditions on a vessel

[9] See also the companion case of *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 333, certiorari denied, 338 U. S. 904.

[10] This Court has held most recently that the result of this case was fully supported by the doctrines of indemnity. *United States* v. *Marshall*, 230 F. 2d 183, fn. 10 at 194.

of which the stevedoring company was fully aware. In both cases the district court held in favor of the longshoreman against the vessel but dismissed the third party action against the stevedoring company. This Court reversed both times on the impleader issue, holding that a stevedoring company, which works its employees in spite of its knowledge of a dangerous condition or defect of the vessel, must reimburse or indemnify the ship for its liability to an injured longshoreman. In this situation the stevedoring company "clearly owed the duty to see that none of its stevedores should work under it [the defective hatch door] until the danger known to exist was removed."[11] A finding of fact, similar to the one here involved, that the stevedoring company's conduct was not a proximate cause of the injury to the longshoreman was set aside by this court as clearly erroneous.[12] *United States* v. *Rothschild International Stevedoring Co.,* 183 F. 2d 181 establishes that the right to indemnity is not curtailed by the circumstance that the defect was known to the vessel.[13]

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[11] *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329, 321 (C. A. 9), certiorari denied, 338 U. S. 904. See also *United States* v. *Rothschild International Stevedoring Co.*, 183 F. 2d 181, 182. In the companion case of *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 333, 334 (C. A. 9), certiorari denied, 338 U. S. 904, this Court characterized as negligence, if not recklessness, the stevedoring company's "working of the men in the known dangerous conditions there existing."

[12] *United States* v. *Arrow Stevedoring Co., ibid.* at 330.

[13] For a detailed discussion of the rule that, in view of its superior experience, the stevedoring company has primary responsibility in determining whether working conditions are safe and that it is not even exonerated where it follows improper advice given by the ship, see pp. 28–29.

We could well end our brief here and confidently rest our argument on the authority of the *Arrow* and *Rothschild* cases. However, it may prove useful to submit to this Court a more detailed analysis of the basis of a ship's right to reimbursement from a stevedoring company. The recent decision of the Supreme Court of the United States in *Ryan Co.* v. *Pan-Atlantic Corp.,* 350 U. S. 124 has made this a timely, and incidentally more simple, task.

I

Appellant is entitled to indemnity under the terms of the stevedoring contract and of the indemnity clause contained in it

Having been held responsible to a longshoreman injured during the unloading of a vessel, appellant seeks to be reimbursed by the stevedoring company which undertook to discharge the ship. Since the stevedoring contract contained express provisions dealing with the ship's right to indemnity appellant's claim rests primarily on this indemnity clause. *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.,* 183 F. 2d 902 at 906, 910 (C. A. 9); *United States* v. *Arrow Stevedoring Co.,* 175 F. 2d 329, 332 (C. A. 9). On the other hand, as this Court has explained in *Booth-Kelly* v. *Southern Pacific Co.,* 183 F. 2d 902, 906, the proper meaning and purpose of that clause can be ascertained only against the background of the general law governing indemnity.

A. The purpose of an express indemnity clause is essentially to clarify the legal positions of the parties in the case where the indemnitor and indemnitee are both to blame

1. *Indemnity or reimbursement as a remedy for breach of contract.* The basis of appellant's claim to be held harmless by appellee for the damages awarded to the injured longshoreman is the consideration that appellee had undertaken not only to unload the vessel, but to unload it safely and competently,[14] and that this obligation was breached when appellee permitted its longshoremen to work under patently dangerous conditions.

The term "indemnity" is frequently used in the field of quasi-contracts to shift the incidence of tort liability according to equitable principles.[15] This definition, however, does not, and does not intend to,[16] take into consideration the instances—of at least equal importance—in which indemnity is sought as a means of reimbursement for damages suffered by the indemnitee as the result of a breach of contract by the indemnitor.

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[14] *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124, 131.

[15] Woodward, *Law of Quasi-Contracts*, p. 409; Keener, *Quasi-Contracts*, p. 408; Leflar, *Contribution and Indemnity between Tortfeasors*, 81 U. of Pa. Law Rev. 130, 147; *City of Chicago* v. *Robbins*, 2 Black 418; *Robbins* v. *City of Chicago*, 4 Wall. 657; *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316; *George's Radio* v. *Capital Transit Co.*, 126 F. 2d 219, 222 (C. A. D. C.); *Restatement of the Law of Restitution*, Secs. 76, 86.

[16] *Restatement of the Law of Restitution*, pp. 328–329; cf. Keener, *Quasi-Contracts*, p. 25.

Since the turn of the century it has become well established that such "indemnity" or better reimbursement is a proper measure of damages to compensate for losses from a breach of contract.[17] The leading case in this field, *Mowbray* v. *Merryweather,* [1895] 2 Q. B. 640,[18] was quickly followed in this country. *Boston Woven Hose, etc., Co.* v. *Kendall,* 178 Mass. 232, 59 N. E. 657 (1901) [19] held that where the purchaser of a boiler had become liable to third persons as the result of an explosion of the boiler, he was entitled to indemnity from the boiler-maker as damages for breach of warranty. And *Dunn* v. *Uvalde Asphalt Paving Co.,* 175 N. Y. 214, 217, 67 N. E. 439 (1903), decided that where a contractor had become liable to third persons as the result of the negligent performance of a contract by a subcontractor, the latter was liable to indemnify the former, even where the parties had not expressly

[17] Cf. *Hadley* v. *Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145.

[18] A ship had engaged a stevedoring company to discharge the cargo and agreed to furnish all the necessary cranes, winches, chains, and other equipment needed for that purpose. One of the chains was defective and broke, injuring one of the stevedoring company's employees. The longshoreman recovered £125 from his employer, who in turn sought to recover this sum from the ship. The Court of Appeals affirmed a judgment for the plaintiff. It held that in the circumstances of the case the ship had given an implied warranty that the chain was sound and that this warranty had been breached. Moreover, it was within the contemplation of the parties that a defect in the chain might result in injury to a longshoreman for which his employer would be held responsible. Hence, these damages were not too remote and the stevedoring company was entitled to be indemnified for the sum paid to its employee, and was not limited to nominal damages.

[19] Quoted with approval in *Union Stock Yards Co.* v. *Chicago, etc., R. R. Co.*, 196 U. S. 217, 226–227 (1905).

stipulated for such indemnity. *Schubert* v. *Schubert Wagon Co.,* 249 N. Y. 253, 257, 164 N. E. 42, 43, established generally that reimbursement is based upon the breach of the duty to perform faithfully, *i. e.,* that it is compensation for having furnished substandard services.

This analysis of the nature of the right to reimbursement was recently reexamined in *Ryan Co.* v. *Pan-Atlantic Co.,* 350 U. S. 124. The issue in the *Ryan* case was the same one which was before this Court in *United States* v. *Arrow Stevedoring Co.,* 175 F. 2d 329, 332, certiorari denied, 338 U. S. 904; *United States* v. *Rothschild International Stevedoring Co.,* 183 F. 2d 181; *States S. S. Co.* v. *Rothschild International Stevedoring Co.,* 205 F. 2d 253, 256–257, *viz,* whether Section 5 of the Longshoremen's and Harbor Workers' Compensation Act prevents a ship, which had to pay damages to a longshoreman, from seeking reimbursement from the longshoreman's employer. The Supreme Court analyzed the nature of the right of indemnity or reimbursement and determined that it was based, not upon any tort, but upon a breach of the stevedoring contract and that Section 5 was not supposed to bar such contractual claim.[20] In this connection the Court stated:

> * * * the contractor has no logical ground for relief from the full consequences of its independent contractual obligation, voluntarily assumed to the shipowner, to load the cargo

[20] The prevailing and dissenting opinions agreed that Section 5 does not preclude reimbursement of the ship by the stevedoring company where, as here, the stevedoring contract contains an express indemnity clause. *Ryan Co.* v. *Pan-Atlantic Corp.,* 350 U. S. 124 at 130 and 141.

> properly * * *. [350 U. S. at 131].
>
> * * * The third-party complaint is grounded upon the contractor's breach of its purely consensual obligation *owing to the shipowner* to stow the cargo in a reasonably safe manner * * *. [350 U. S. 131–132.] [Emphasis in original.]

Again, at pp. 133–134, the Court explained the legal relations of the parties:

> * * * That [stevedoring] agreement necessarily includes petitioner's [the stevedoring company's] obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of noncontractual relationship. *It is of the essence of petitioner's stevedoring contract.* It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service. [Emphasis supplied.]

2. *The express indemnity clause in the contract is designed to alleviate uncertainties in the application of the indemnity rules.*

a. A considerable degree of difficulty in the operation of the indemnity rules is occasioned by the circumstance that the indemnitee himself usually had committed some wrong, otherwise he would not have

been held responsible to the third party,[21] here the longshoreman. As the Supreme Court pointed out in *Union Stock Yards Co.* v. *Chicago, etc., R. R. Co.,* 196 U. S. 217, 218, the typical situation in which indemnity may be awarded is one in which:

> * * * [t]he principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer [the indemnitor], and the other [the indemnitee] has been held liable to third persons *for failing to discover or correct the defect* caused by the positive act of the other [the indemnitor]. [196 U. S. at 228.] [Emphasis and matter in brackets supplied.]

This culpability of the indemnitee does not defeat his right to reimbursement. The duty breached by him was owed to the original plaintiff, not to the indemnitor (*Mowbray* v. *Merryweather,* [1895] 2 Q. B. 640. As Chief Justice Holmes pointed out in *Boston Woven Hose, etc., Co.* v. *Kendall,* 178 Mass. 232, 236–237, 59 N. E. 657, 658, the negligence of the indemnitee ordinarily is induced by the very representation of the contractor that he will perform his undertaking properly. Certainly, a customer is entitled to rely to a large extent on the specialized knowledge and expertise of contractors "professing competence and experience" and who warrant the skill of their trade (*"spondentes peritiam artis"*). *H. & C. Grayson* v. *Ellerman Line,* [1920] A. C. 466, 472, 474 (H. of L.). See also *Bethlehem Shipbuilding Corp.* v. *Joseph Gutradt Co.,* 10

[21] Except, of course, in the instances where liability is imposed without fault, as, *e. g.*, in the case of the breach of warranty of seaworthiness.

F. 2d 769, 772 (C. A. 9); *Seaboard Stevedoring Co.* v. *Sagadahoc S. S. Co.,* 32 F. 2d 886 (C. A. 9).

As the Supreme Court held in *Ryan Co.* v. *Pan-Atlantic Corp.,* 350 U. S. 124, 134–135:

> * * * it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. * * *[22]

The circumstance that the indemnitee usually has committed a tort against the injured person, however, does inject a disturbing element into this area and courts frequently have determined the indemnitee's right to recover damages for the breach of the indemnitor's undertaking to perform safely and properly, on the basis of formulae borrowed from the law of torts and quasi-contracts. Relief has been granted and withheld depending on the determination *vel non* that the parties were *in pari delicto*[23] or that the negligence of the indemnitor was concurrent rather than primary and secondary[24] or that the indemnitee

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[22] To the same effect: *Derry Electric Co.* v. *New England Telephone & Telegraph Co.*, 31 F. 2d 51, 52 (C. A. 1); *Manning Mfg. Co.* v. *Hartol Products Corp.*, 99 F. 2d 813, 814 (C. A. 2); *General Accident, etc.* v. *Goodyear Tire & Rubber Co.*, 132 F. 2d 122, 125 (C. A. 2); *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.*, 183 F. 2d 902, 907 (C. A. 9); *Restatement of the Law of Restitution*, Secs. 93, 95, comment a, par. 2; Leflar, *Contribution and Indemnity between Tortfeasors*, 81 U. of Pa. Law Rev. 130, 156–158; Note: *Contribution and Indemnity Between Joint Tort Feasors*, 45 Harv. Law Rev. 349, 351–352.

[23] *Union Stock Yards Co.* v. *Chicago, etc., R. R. Co.*, 196 U. S. 217, 228; see also *States S. S. Co.* v. *Rothschild International Stevedoring Co.*, 205 F. 2d 253 (C. A. 9).

[24] *Torres* v. *The Kastor*, 227 F. 2d 664 (C. A. 2).

had been guilty of active rather than passive negligence.[25]

Only the recent decision of the Supreme Court in *Ryan Co.* v. *Pan-Atlantic Corp.,* 350 U. S. 124, 133 had settled that the concepts of primary and secondary negligence or of active and passive tortious conduct can have no applicability in this area of liability which rests upon a contractual basis.

b. To this area of doubt, especially as it existed prior to the *Ryan* case, express indemnity clauses of the kind here involved serve the purpose of establishing a rule of thumb in order to determine whether or not the ship is entitled to reimbursement[26] and thus to avoid much unnecessary litigation and the wasteful requirement that both parties have to take out liability insurance.[27]

B. Appellee's negligence was one of the proximate causes of Harrison's injuries. Appellant's acts or omissions did not relieve appellee from its liability, and this accident does not come within any of the exceptions of the indemnity clause

According to Clause 12 of the Stevedoring Agreement (R. 102–105) appellee agreed to be responsible and to hold the Government harmless from any and all loss, damage, liability and expense for * * * bodily injury or death of persons:

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[25] *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 328, 529, 107 N. E. 2d 463, 471; cf. the discussion in the Court of Appeals in *Palazzolo* v. *Pan-Atlantic S. S. Corp.*, 211 F. 2d 277, 279 (C. A. 2), affirmed *sub. nom. Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124.

[26] Cf. *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.*, 183 F. 2d 902, 910 (C. A. 9).

[27] Cf. the insurance clause of the stevedoring contract at R. 103, 104.

> * * * occasioned either in whole or in part by the negligence or fault of the Contractor, his officers, agents or employees in the performance of work under this contract.[28] * * *

Appellee also agreed to take out commensurate insurance (R. 103–104).

The basic test as to whether appellant is entitled to indemnity thus is whether the bodily injury of the longshoreman for which the ship has been held responsible was occasioned either in whole or in part by the negligence or fault of the appellee in the performance of work under the contract.

There can be no question that the longshoreman's injury was caused in whole or in part by the appellee's negligence. The stevedoring company's representatives on board the vessel, the foreman and the "walking boss," both were aware of the dangerous, slippery condition of the deck. In those circumstances, appellee "clearly owed the duty to see that none of its stevedores should work until the danger known to exist was removed." *United States* v. *Arrow Stevedoring Co.,* 175 F. 2d 329, 331 (C. A. 9), certiorari

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[28] This liability is subject only to the following exceptions: (1) that the accident was caused by the unseaworthiness of the vessel or a defect of the equipment, and the stevedoring company exercising due care either (a) could not have discovered the unseaworthiness or the defect, or (b) could not have prevented the accident; and (2) that the accident resulted (a) solely from an act or omission of the Government, or (b) from proper compliance of the stevedoring company with specific directions of the contracting officer. These are not even true exceptions. In exceptions 1 (a), 1 (b), and 2 (a) the stevedoring company is not guilty of any negligence or fault, hence the indemnity clause would not come into play in any event; in situation 2 (b) the vessel expressly assumes responsibility.

denied, 338 U. S. 904; *United States* v. *Rothschild International Stevedoring Co.,* 183 F. 2d 181, 182 (C. A. 9); *Berti* v. *Compagnie de Navigation Cyprien Fabre,* 213 F. 2d 397, 401 (C. A. 2); see also *American Stevedores* v. *Porello,* 330 U. S. 446, 449. Indeed, as this Court has held in *United States* v. *Arrow Stevedoring Co.,* 175 F. 2d 333, 334, certiorari denied, 338 U. S. 904, appellee's behavior constituted recklessness rather than ordinary negligence.

Appellee is not relieved of its liability by virtue of the vessel's concurrent fault—if any—*i. e.,* its apparent request that the longshoremen attempt to unload the jeeps carefully in spite of the oily deck, and its failure to furnish sand or sawdust.

1. *Appellant's concurrent negligence would not defeat appellee's contractual liability to reimburse the ship.* Assuming for the sake of argument that appellant was guilty of negligence in permitting oil to accumulate on the shelter deck,[29] appellee still would not be relieved of its contractually assumed liability to reimburse appellant.

We have shown (pp. 20–23) that even in the absence of an express indemnity clause, reimbursement would not be precluded by the indemnitee's concurrent fault, in particular in those instances where the indemnitor is a specialist contractor.[30] Moreover, it is the very

[29] The slippery condition of the deck probably made the vessel unseaworthy and thus liable to the longshoreman. The record, however, does not indicate whether this condition was caused by the negligence of appellant's officers or employee's or by circumstances completely beyond their control.

[30] See *e. g., United States* v. *Savage Truck Line Co.,* 209 F. 2d 442 (C. A. 4), certiorari denied, 347 U. S. 952, where a shipper,

purpose of express indemnity clauses to eliminate the legal confusion frequently caused by the concurrent fault of the indemnitee (p. 23). In this case, the very terms of the clause show that such concurrent fault is not supposed to affect the right to reimbursement. The contract provides that appellee is bound to reimburse appellant for all accidents caused in whole or in part by appellee's fault. Liability is precluded only where the injury results solely from an act or omission of the ship. In other words, the fact that an accident was caused jointly by appellant and appellee does not defeat appellant's right to indemnity.

Finally it is significant that the indemnity clause in *American Stevedores* v. *Porello,* 330 U. S. 446, although far less explicit than the one here involved, still was interpreted as providing for indemnity in the event of the concurrent fault of the ship. In that case the stevedoring company agreed to be responsible for all damage or injury to persons or cargo "through the negligence or fault of the Stevedore" (330 U. S. at 457). The contract thus omitted the words present in this contract, *viz,* "occasioned either in whole or in part." The Court of Appeals had held that the clear meaning of the clause was that the stevedoring company would be liable as long as the accident was caused in whole or in part through its negligence, and

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who had improperly loaded a truck to the knowledge of the carrier, had been held responsible to third persons injured in an accident caused by the improper loading. The court held that the shipper who had created the dangerous condition himself, nevertheless, was entitled to be indemnified by the carrier.

that this liability would not be defeated by the ship's concurrent liability. The Supreme Court reversed on the ground that the clause was ambiguous and that profferred evidence relating to the intention of the parties should have been taken (330 U. S. at 457, 458). Upon remand, the District Court upheld the Court of Appeals' interpretation of the indemnity clause. *Porello* v. *United States,* 94 F. Supp. 952 (S. D. N. Y.). If concurrent negligence of the vessel did not defeat its right to indemnity under the *Porello* clause, *a fortiori,* it cannot have that effect under the explicit language of this contract.

2. *Appellant's request to unload the vessel in spite of the slippery condition of the deck did not defeat its right to indemnity.* According to the indemnity clause the right to reimbursement does not extend to injuries which:

> * * * resulted solely from proper compliance by officers, agents or employees of the Contractor with specific directions of the Contracting Officer.

None of the conditions of this exception to the indemnity clause has been met. The evidence is hazy as to the identity of the officer who requested the unloading of the vessel in spite of the slippery deck. There is no allegation, no finding, nor even a scintilla of evidence that he was the "Contracting Officer." Neither the findings nor the testimony reveal any "specific instruction". At most, it appears that some officer advised the "walking boss" of the fact that the vessel was pressed for time and suggested that the long-

shoremen try their best in the circumstances.[31] The ultimate decision plainly was left to the stevedoring company and the longshoremen. Nor can it be said that appellee's agents on board ship were so overawed by the military that they considered every suggestion to be a command. The testimony of the foreman Jensen (pp. 5–6, n. 5) shows beyond doubt that he was "running the job" and would not tolerate any interference with it. Finally, in view of the stevedoring company's duty to stop operations when they became unsafe (pp. 24–25), compliance with instruction to unload in spite of the slippery deck would not have been "proper compliance" within the meaning of the contract.[32]

The result would be the same even in the absence of the express indemnity clause. A stevedoring company is not the ship's agent; it is an independent contractor. *The Adah,* 258 Fed. 377, 380 (C. A. 2); *Cory Bros. & Co.* v. *United States,* 51 F. 2d 1010, 1013–1014; *McGeeney* v. *Moran Towing Corp.,* 149 F. 2d 791, 793 (C. A. 2). Moreover, as a specialist and experienced technician in the field of safely loading and unloading vessels,[33] the stevedoring company has primary responsibility for the selection of the methods

[31] *McGeeney* v. *Morgan Towing Corp.*, 149 F. 2d 791 (C. A. 2), indicates that usually the ship's "wishes" and "requests" must be considered to be in the nature of suggestions.

[32] "Only the clearest requirement to do something which is dangerous can relieve the contractors from the exercise of ordinary prudence." *The Robert R.*, 255 Fed. 37, 40 (C. A. 2).

[33] *McGeeney* v. *Moran Towing Corp.*, 149 F. 2d 791, 793 (C. A. 2); *Cornec* v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502 (C. A. 9), certiorari denied, 284 U. S. 621; *The Evelyn*, 282 Fed. 250, 252 (C. A. 2).

in which these operations are carried out.[34] In these circumstances it was the contractor's duty to stop the work as soon as he realized that it is unsafe. *McGeeney* v. *Moran Towing Corp.,* 149 F. 2d 791, 793; *The Robert R.,* 255 Fed. 37, 39 (C. A. 2); *The Adah,* 258 Fed. 377, 380 (C. A. 2).[35]

And this responsibility persists even where the ship requests the stevedoring company to go ahead with the work in spite of the danger. The reason for this rule is that the stevedoring company has been hired as an experienced specialist for the very purpose of exercising its judgment in these matters. A request by the ship therefore does not affect the contractor's responsibility toward third parties and even the ship. *McGeeney* v. *Moran Towing Corp.,* 149 F. 2d 791, 793 (C. A. 2).[36]

3. *Appellee is not relieved of liability by virtue of the ship's failure to furnish sand or sawdust.* The ship's failure to supply sawdust or sand did not relieve the stevedoring company of responsibility either. The paramount duty of the stevedoring company is to load or unload the cargo safely (pp. 19–20). If this

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[34] *Porello* v. *United States*, 153 F. 2d 605, 608 (C. A. 2), reversed on other grounds, 330 U. S. 446; *Seaboard Sand & Gravel Co.* v. *Moran Towing Corp.*, 154 F. 2d 399, 401 (C. A. 2).

[35] In that case the stevedoring company was held responsible to a third party for failure to trim the cargo, in spite of the fact that the stevedoring contract did not provide for such service. Note, under the clause here involved, the test is whether the injury to the third person was caused by the contractor's fault.

[36] There the stevedoring company was held primarily responsible and the Court of Appeals upheld the District Court's refusal to divide damages between the stevedoring company and the ship. To the same effect *The Evelyn*, 282 Fed. 250.

is not feasible in the absence of some equipment, the stevedoring company must try to obtain it either from its own supplies or from the vessel. An initial refusal on the part of the ship does not permit the stevedoring company to operate in an unsafe manner. It must be "energetic" in trying to secure the proper implements either from the ship or other sources. *Metcalfe* v. *Chiarello,* 294 Fed. 29, 30 (C. A. 2). Similarly, in *Smith* v. *Nicholson Transit Co.,* 39 F. Supp. 795 (W. D. N. Y.), where a barge had been damaged as the result of improper stowage by a stevedoring company, which had not been furnished proper dunnage by the steamship which utilized its services, the court held that the steampship's failure to furnish dunnage did not relieve the stevedoring company from liability to the barge. Thus the test of the indemnity clause again has been met, *i. e.,* the injury has been caused in whole or in part by the negligence or fault of the stevedoring company or its agents.[37]

In this case, the accident could have been avoided had appellee been *energetic* or astute in obtaining sand. The longshoreman suffered his injuries only after all of the jeeps had been removed from the shel-

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[37] In *Metcalfe* v. *Chiarello* and *Smith* v. *Nicholson Transit Co.*, in the absence of an express indemnity agreement, the stevedoring company was held responsible only for one-half of the damages. However, as we have shown (p. 23) it was the very purpose of the express indemnity clause to provide for full reimbursement of the vessel in all situations in which the stevedoring company was to any extent responsible for the "loss, damage, liability and expense."

ter deck. The unloading of the jeeps took about an hour (p. 7); subsequent events proved that an abrasive could have been procured within 15–20 minutes (p. 8). Thus the accident would have been prevented if appellee had been insistent in demanding that the ship obtain sand or sawdust, or if itself had taken the initiative in procuring such gritty material. Moreover, it should be remembered that appellee was in a better position to obtain the sand. Appellant's officers aboard the vessel probably were strangers in port. Appellee's employees on the other hand, were fully familiar with the San Francisco Bay area.[38] In these circumstances it may be assumed safely that they were aware of the existence of the sand blasting shops from which the sand actually was obtained (R. 107), or of some other source of abrasives in the vicinity of the vessel.

These reflections also show that the exception set forth in par. b (1) of the indemnity clause (R. 103) is not applicable. Under that provision appellee is relieved from liability where the accident is caused in part by the unseaworthiness of the vessel and appellee either could not discover the defect or through the exercise of diligence could not have avoided the injury. Appellee was aware of the unsafe condition of the vessel, and it could have avoided the accident either by stopping the work or by exercising due diligence in obtaining sand.

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[38] The foreman, Jensen, had been working as a longshoreman and foreman in this vicinity for about thirty years.

II

The findings of the court below do not preclude full review of the record

We have established on the preceding pages of this brief that Harrison's accident, as a result of which the Government has been subjected to liability, was occasioned at least in part by appellee's failure to stop the work while the dangerous condition existed and its neglect itself to obtain, or to cause the ship to obtain, sand or some other gritty substance. Accordingly, under the decisions of this Court in *United States* v. *Arrow Stevedoring Co.,* 175 F. 2d 329, 333, certiorari denied, 308 U. S. 904, and *United States* v. *Rothschild International Stevedoring Co.,* 183 F. 2d 181, as well as pursuant to the terms of the express indemnity clause contained in the stevedoring contract, appellant is entitled to be reimbursed in full.

This evaluation of the testimony in the record is not precluded by the district court's Findings Nos. XV and XVI, R. 32–33, to the effect that the accident was caused solely by appellant's negligence; that appellee did not fail to perform according to the terms of the stevedoring contract; that appellee did not fail to provide proper safeguards or to use reasonable care for the prevention of foreseeable accidents; in sum, that the longshoreman's injuries were not caused in whole or in part by any neglect on the part of appellee in the conduct of its activities aboard the vessel.

Assuming for the sake of argument that these findings of the district court are true findings of fact [39]

[39] *McAllister* v. *United States*, 348 U. S. 19, establishes that in admiralty cases the Courts of Appeals have no greater scope of

they are as "plainly erroneous" as those set aside by this Court in *United States* v. *Arrow Stevedoring Co.,* 175 F. 2d 329, 330. However, in the absence of any dispute as to material facts, the findings that appellant was exclusively negligent, that appellee had used all reasonable care in the premises, and that the longshoreman's injury was not caused by appellee's fault or neglect, were rulings as to the proper standard of care. As Learned Hand, J., pointed out in *Barbarino* v. *Stanhope S. S. Co.,* 151 F. 2d 553, 555 (C. A. 2):

> * * * to fix any standard of care two conflicting interests must be always appraised and balanced * * *. *Such choices are the very stuff of law,* and as to them the appellate courts have no reason to defer to the decisions of courts of first instance. [Emphasis supplied.]

Rulings on the issue of negligence based on undisputed facts and limited to establishment of standards of care thus are not genuine findings of fact but conclusions of law.[40] As such they are freely reviewable. *Barbarino* v. *Stanhope S. S. Co.,* 151 F. 2d 553 (C. A. 2); *Kreste* v. *United States,* 158 F. 2d 575, 577 (C. A. 2); *Guerrini* v. *United States,* 167 F. 2d 352, 356 (C. A. 2), certiorari denied, 335 U. S. 843; *Bonnewell* v. *United States,* 170 F. 2d 411, 412 (C. A. 4); *Lynch* v. *Agwilines,* 184 F. 2d 826, 828, modified as to costs, 186 F. 2d 796 (C. A. 2).

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review over findings of fact than they have in civil cases under Rule 52 (a), Federal Rules of Civil Procedure.

[40] Significantly, Findings of Fact XV and XVI (R. 32–33) on the issue of negligence are identical in substance with Conclusions of Law Nos. III–VI (R. 34).

CONCLUSION

For the above reasons, it is respectfully submitted that the decision below should be reversed and that the cause be remanded to the district court with instruction to enter judgment in favor of the United States for all damages and costs awarded to the libellant longshoreman against appellant.

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